

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2106

To be argued by
HENRY J. BOITEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2106

LOUIS CHARLES KING,
Petitioner-Appellant,

-vs.-

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal From The United States District Court
For The Northern District of New York

BRIEF IN BEHALF OF PETITIONER-APPELLANT
LOUIS CHARLES KING

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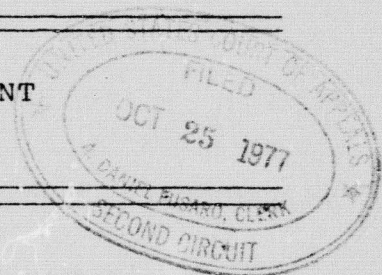


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BRIEF IN BEHALF OF PETITIONER-APPELLANT
LOUIS CHARLES KING

Preliminary Statement

Following a jury trial in the Northern District of New York (MacMahon, D.J.), appellant Louis Charles King [hereinafter, "King"], was convicted upon several counts of an indictment which charged the financing and collection of extortionate extensions of credit, and conspiracy to do so (18 U.S.C. §§ 892, 893 & 894). On May 25, 1973, he was sentenced to serve seven (7) concurrent terms of

twenty (20) years imprisonment, and to pay a fine of \$10,000.00. This Court affirmed the conviction, without opinion, 486 F. 2d 1397 (1973), cert den., 466 U.S. 958 (1974).

He thereafter filed a petition for relief pursuant to 28 U.S.C. § 2255, seeking vacation of the judgment and sentence, together with related relief, including: disqualification of the trial judge from hearing the petition, a hearing, and discovery. As alternative preliminary relief, he sought an order of the Court to depose certain witnesses. He further sought an order sealing the files of the case and prohibiting the direct or indirect disclosure to prospective witnesses of the pendency of the § 2255 proceeding.

By an order, filed in the District Court on January 18, 1977, Judge MacMahon directed the government to respond to the petition, denied the application for a protective order, but directed the Clerk of the Court to seal the file. (99-100)*

* The appendix upon this appeal is divided into two parts, separated by a colored slip sheet. Part I (pp. 1-191), includes the docket sheets, the § 2255 pleadings of both parties, the two orders of the district court, and the notice of appeal. Part II (pp. A. 1-A. 318) is a copy of the appendix which was filed in the district court in support of the § 2255 application, and retains its original pagination.

By an order and opinion (163-190), dated July 29, 1977, after receiving a response from the government and a reply from the petitioner, Judge MacMahon denied the application for his disqualification, and denied all of the relief requested by the petition, without a hearing.

This is an appeal from the denial of each of the items of relief sought in the § 2255 proceeding.

Questions Presented for Review

1. In view of the trial judge's demonstration of bias and prejudice, the relationship of his own conduct to the relief requested by the petition, and his own status as a witness with respect to the facts underlying the request for relief, should he have been disqualified from presiding with respect to the 28 U.S.C. § 2255 proceeding?
2. If the trial jurors, although sequestered, were exposed, in fact, to prejudicial publicity concerning the defendant, then was the defendant deprived of a fair trial and is he entitled to vacation of the sentence and judgment?
3. Is an evidentiary hearing required where facts are stated which show that one or more jurors was exposed to prejudicial publicity? Is a sufficient factual showing made by this petition to demonstrate the need for a hearing?
4. Assuming, arguendo, that the facts established by the petition are insufficient to require a hearing, do the circumstances of this case require that the Court lend to the petitioner its authority for the purpose of taking depositions from relevant witnesses?
5. Assuming, arguendo, that, during his trial, a defendant voluntarily engages in an act which ultimately results in incapacitating physical injuries that prevent his continued attendance at the trial, and which generate substantial prejudicial publicity, which improperly reaches a sequestered jury, is he thereafter foreclosed from complaining that he has been deprived of his right to attend at the trial and to have an unbiased jury?

6. Where police officers utilize excessive force in counteracting a defendant's "voluntary act", thus generating unwarranted publicity and causing the defendant not to attend his own trial, is the defendant thereby deprived of a fair trial and of his Sixth Amendment right?

Statement of Facts

A. Events Prior to the Shooting of Petitioner.

Indictment No. 73 Cr. 9, charged petitioner and others with making, financing and collecting extortionate extensions of credit, and conspiracy to do so (18 U.S.C. §§ 892, 893 & 894). (A. 1)* The other defendants charged by the indictment were Albert J. Marrone, James Vincent Talerico, Jack Zogby, Carl J. Mazza, and "John Doe".

A jury trial commenced, at Utica, New York, on February 20, 1973, with Judge MacMahon presiding. At trial, King was represented by Louis T. Brindisi, Esq., and the government appeared by Assistant United States Attorney Eugene Welch.

Prior to the selection of the jury, the Court granted a prosecution motion for sequestration of the jury (A. 11). On the following day, the prospective jury sequestration received local newspaper coverage (A. 16-18). Following the selection of the jury, it was, in fact, sequestered (A. 21).

The government's case was centered upon the testimony and activities of one J. Schuyler Sackman, the

* See the key to page references, supra, p. 2.

recipient of alleged extortionate extensions of credit. Each count of the indictment related to the activities of the defendants with respect to Sackman. The central issue at trial, concerning King, was whether Sackman, who instigated a loan to himself while acting as a government informant, was actually the subject of criminal conduct on the part of King. King's defense was that Sackman had cunningly interwoven King into the facts of the case and had wrongfully pleaded with King to assist him. In short, the issues at trial related to: Sackman's credibility, the presence or absence of criminal intent on the part of King, and whether or not a government informant working under the supervision and direction of the FBI could be a victim of the type of criminal conduct charged by the indictment (See: Sackman's testimony at A. 24-35, and testimony of King at Tr. 834-859).*

B. King's Absence from a Portion of the Trial.

The weekend of February 24-25 fell in the midst of trial. The local newspapers of Sunday, February 25, 1973, exclaimed with front page headlines, photographs and text, concerning an event which allegedly occurred on the

* References preceded by "Tr." are to those portions of the trial transcript which are not reproduced in the appendix (See: Rule 30[a] of the Federal Rules of Appellate Procedure).

prior evening. In short, the papers claimed that King had engaged in a "shoot out" with Federal and local law enforcement officers after he, allegedly, had sought to throw a live hand grenade into the home of J. Lewis Kelly, the agent in charge of the Utica FBI Office. Newspaper clippings of February 25, 1973, and of the ensuing days, are reproduced at A. 141-158. The newspapers claimed, inter alia, that the FBI had been "tipped" to the fact that a "hoodlum" intended to throw a hand grenade into Kelly's home, and that a surveillance had been underway for the prior week with respect to that "tip".

On Monday morning, February 26, 1973, King's attorney moved the Court for a mistrial upon the ground that King had been shot over the weekend and was in critical condition due to the removal of portions of his intestines, serious injury to the arteries of his right leg, and paralysis. (A. 37-38). The Court denied the motion upon the ground that King had brought his injuries upon himself (A. 39). The Court also denied a motion for a voir dire of the jury for the purpose of ascertaining whether they had any knowledge of King's involvement in the shooting incident (A. 40-41), as well as a motion for an adjournment of the trial to the hospital so that King might attend at the continuation of his own trial (A. 40-42). After a luncheon recess on that day, defense counsel reported to the Court that newspapers had been given to the jury and then retrieved. The Court persisted in its refusal to voir dire

the jury. (A. 47-48).

Later in the trial, the Court granted defense counsel's application for King to testify before the jury at the auditorium of the hospital (A. 51-56), and proceedings were adjourned to the hospital, where King testified from a bed with the assistance of an amplifier (A. 66-69).

Following the jury's verdict, defense counsel again argued that the trial should not have been conducted in the absence of petitioner, and it was error for the Court not to voir dire the jury (A. 91). That afternoon, the Court conducted a hearing, in the absence of King, and found that King had voluntarily absented himself from the trial, thus, in the Court's opinion, justifying the continuation of the trial in King's absence (A. 93-137).

C. The Sentence.

After postponements due to King's injuries (A. 138-139, A. 161-162), King was eventually sentenced on May 25, 1973, to serve seven (7) concurrent terms of twenty (20) years imprisonment, and to pay a fine of \$10,000.00 (A. 140[c]).

In commenting upon the evidence, the Court stated to King:

"It shows you to be a cold blooded, cruel, viscious and violent man as to society." (A. 140[c]).

In contrast to the sentences imposed upon

King, the co-defendants Marrone and Talerico, each received sentences of seven (7) years imprisonment, and the co-defendants Zogby and Mazza, each received sentences of ten (10) years imprisonment (A. 195).

D. The Appeal.

Appeals were taken by each of the defendants, and their convictions were all affirmed, without opinion, by this Court, 486 F. 2d 1397 (1973), cert den., 466 U.S. 958 (1974).*

E. The April 9, 1975 Petition for Relief.

On or about April 9, 1975, a petition for relief, pursuant to 28 U.S.C. § 2255 and F.R.Cr.P. Rule 33, was filed in the district court, predicated upon disclosure to the jury of prejudicial publicity during trial (A. 258-260). As demonstrated in the instant petition, 40-46, King was not properly a party to that petition. Since Judge MacMahon does not rest his present determination upon the fact of the prior petition, which was denied, we shall not burden this Court by an analysis of why King should not be taxed with a "successive petition" issue.

* The issues raised on appeal, and the relationship of the appeal to the present proceeding, are discussed infra, at p. 30. Copies of the appellate briefs of both sides, as well as the petition for a writ of certiorari, are reproduced, respectively, at A. 163-196, A. 197-225, and A. 227-256.

The matter is fully discussed in the petition (Id.), and documented in the appendix that was filed with the petition (A. 261-305). (See also: King affidavit, at pp. 89-90).

F. The Occasion, Cause and Extent of King's Injuries.

During an evening, in the midst of trial, King allegedly threw a hand grenade (which did not explode) into the home of an FBI agent who was connected with the investigation of the instant case. It is clear that Federal and local agents expected King to arrive at the agent's home, and were lying in wait for him there. They knew that, in fact, there was no one in the home to be injured, since the agent and his family had earlier been removed. Nevertheless, the authorities made no prior effort, despite their prior knowledge, to prevent King, in advance, from executing whatever plan they thought he had in mind. Instead, their apparent intent was to permit the situation to reach a deadly force level.

Thus, when King arrived, the law enforcement officers unleashed a veritable firing squad assault upon him - nothing else can explain the gross number of bullets which entered King's body - seventeen in all, each entering from the back. (91).

King's affidavit, filed in support of the instant petition, shows that while wounded, he made his way from the scene to a car, which transported him a distance, and out of which he fell, face down, in the parking lot of a Ramada Inn.

There, two men, apparently law enforcement officers, came upon him, threw a revolver down by his face, and shot him three times in the back, as he lay face down. When an ambulance arrived, it was made to wait some forty minutes before being permitted to bring him to the hospital. Before that, an FBI agent stuck a grappling hook into the flesh of his ribcage and lung, attached it to the bumper of a car, and dragged him some distance (91-92).*

Prior to King's trial testimony at the hospital, Judge MacMahon convened a hearing, in the absence of the jury, with respect to King's condition and appearance. Doctor Bradford Millett testified that King had been brought into the emergency room on Saturday night, in a critical state, in shock, with multiple gunshot wounds and blood loss. He described the wounds as follows:

"There were two in the left shoulder; one in the right axillary; two in the chest; one through the sacrum; one through the end of the lateral aspect of the left knee; one in the exterior left thigh; one in the anterior left thigh; I counted a total of approximately fifteen perforations made. We could pick up eleven or twelve metal objects or buckshots

* In an effort to persuade the trial court to grant him a hearing and related relief, preliminary to disposition of the petition, King has offered to take a polygraph test with respect to the aforesaid facts (92).

made by .38 special pistol bullets."
(A. 60).

Only some of the bullets were capable of being removed, and, due to the injuries, three feet of King's intestines were removed, he was given a colostomy, he suffered from massive hemorrhage, and a large vein and artery were completely severed, etc. (A. 60-61). The doctor described King's condition:

"He has a tube in his nose and intravenous in his arms and he has a bandage around his head which can be reduced, and a small bandage in the back of his head." (A. 64).

G. Facts Indicating the Exposure of the Jury to
Prejudicial Publicity - the Trial Facts.

When defense counsel, on the first day of trial after the incident, moved the Court to voir dire the jury, the Court responded:

"I deny it. The jury has been sequestered during the trial and I am assured by the marshall that they heard no reports or any incidents over the weekend including the alleged assault by King on the Special Agent Kelly.

" [Defense counsel]: I say this because I understand they were able to talk to their families.

"THE COURT: All telephone calls have been screened through the marshalls, and for that reason I refuse to conduct a voir dire at this time or any time. That is why I sequestered the jury and I directed that they couldn't listen to radio reports, or read newspapers or see television reports." [Emphasis added] (A. 40-41).

After the luncheon recess of that day, defense

counsel reported to the Court upon information he had learned from another attorney who had secured it from a United States Marshall:

"[Defense counsel]: He informed me also that the jury received newspapers and when they got them they were taken back by the marshall, and as the Court knows, the incident that occurred over the weekend, it was all over the front page of the newspaper, where the jury could draw any inference." (A. 47-48).

The Court continued to refuse to voir dire the jury (A. 48).

During the remainder of the trial, the Court cautioned the jurors with respect to publicity, and told them not to speculate about King's absence or the reasons for his injuries (A. 50, A. 70), and not to speculate concerning the reasons for the security measures which had existed throughout the trial (A. 76-7).

Immediately following the jury's verdict, defense counsel again argued that the trial should not have been conducted in the absence of King, and that it was error for the Court not to voir dire the jury (A. 91-94). The Court responded as follows:

"Whether to conduct a voir dire of the jury is always a matter of the court's discretion, and in view of the fact that this court had this jury sequestered, and in view of the fact that there were -- the television was turned off, and no newscast and that they didn't have cause to hear the broadcast, and for the further reason that sequestering the jury is to shield them from publicity prejudicial to the defendants.

"Therefore, it could only have been a

needless waste of the court's time and put further delay on this trial under circumstances where safety was paramount, and in the interests of the jury's safety and the interest of the safety of the court and the witnesses and even defense counsel, and some of the defendants.

"So I denied that motion in the exercise of my discretion, and it was wholly unnecessary and useless under the circumstances to conduct such a voir dire." (A. 95-96).

Then, in the absence of King, and over his attorney's objections, the Court convened a hearing, at which an FBI agent gave one page of testimony, from which the Court found that King had voluntarily absented himself from the trial (A. 121-122; A. 123-137). In the course of its ruling, the Court noted:

"***And as Mr. Brindisi reported on Monday morning, shortly thereafter King was apprehended a few miles away in the parking lot of the Ramada Inn Motel, and as Mr. Brindisi did not report but as the court then knew that Motel was the place where the jury had been sequestered from the beginning of this trial. The court does not know whether King's arrival there was accidental or coincidental or deliberate. It is of no moment. Again, according to reports both from Brindisi and the Assistant United States Attorney, and it has been widely publicized, shots were exchanged and King was further injured and taken to St. Luke's Hospital***." (A. 127-128). [Emphasis added].

H. Facts Indicating the Exposure of the Jury to
Prejudicial Publicity - the Facts Learned Since
the Trial.

At the time of trial, the only basis for the claim that the jurors had been insulated from the publicity,

was an ex parte conversation that the Court stated it had with a marshall (A. 40-41, 95-96). The Court did not voir dire the jury, nor did it have a hearing, "at least of the marshalls or people in whose custody the jury was, or any other persons who may have come in contact with the jury wherever they were housed, or any employees of the place where they were housed." (A. 107-108). After the jury returned its verdict, the Court admonished it as follows:

***I want to caution you again not to talk about this case. If anybody tries to talk to you, with you, you are to contact the FBI immediately.

"Now you are all adults and this is a serious matter and if anybody tries to contact you about this case call the FBI immediately. You are excused." (A. 89-90).

It was clear to the attorneys that they had been prohibited from questioning the jurors (A. 266).

1. The executed statement of
_____ a juror.

One of the jurors in the case was Helen Postal. On October 26, 1975, Mrs. Postal executed a statement acknowledging that she was a trial juror. Her statement further alleges that, while staying at the Ramada Inn during the trial, she had the opportunity to read newspapers and read articles of the case. It further appears that she saw "news briefs" on the television which was available in her room at the Ramada Inn. Finally, she states that when the trial

resumed on Tuesday, the 27th of February, 1973, and the Court convened in St. Luke's Hospital, she was "aware why the defendant was in the hospital at the time."

A copy of Mrs. Postal's statement is reproduced at A. 307. It bears the signatures, as witnesses, of Michelle Malina and Vict DeSantia. Although the statement is captioned as an affidavit, it is not, in fact, notarized.

When King retained new counsel to prepare the instant petition, and when his new attorney was advised of the existence of Mrs. Postal's statement, a private investigator was sent to interview Michelle Malina, one of the persons who had witnessed the juror's statement. (49, 83-4). Michelle Malina's affidavit, dated June 24, 1976, is reproduced at A. 306. It states, in pertinent part, as follows:

"2. On October 26, 1975, I was present when Mrs. Helen Postal signed the attached affidavit. On this occasion, I also signed the document which I am re-signing today, June 24, 1976.

"At the time Mrs. Postal stated that she was a juror in the conspiracy/extortion trial of four men including Louis Charles King in February of 1973. She further stated that during the trial she and the other jurors stayed at the Ramada Inn on Burstone Road in New Hartford, New York. During her stay, she read newspaper accounts of the trial and saw television coverage as well. Mrs. Postal also confirmed that she and the other jurors dined in the Ramada Inn's main dining room which was open to the public.

"When the trial resumed on February 27, 1973, Mrs. Postal stated in my presence that

she was aware why Mr. King was in St. Luke's Hospital."

2. The oral statements of Ronald Wakeel, and the directive that he not execute an affidavit.

In the April 9, 1975, § 2255 application*, to which King was not properly a party, an affirmation signed by three of the trial attorneys stated that Ronald Wakeel was the manager of the Ramada Inn in question, had spoken to them freely concerning events which had occurred at the Ramada Inn during the course of the jury's sequestration, but eventually refused to execute an affidavit since the board of directors of the Ramada Inn had directed him not to do so (41, A. 261-267).

Subsequent to all of the aforesaid events, King secured new counsel, Henry J. Boitel, Esq. After extended efforts, including the sending of an investigator to Utica, Mr. Boitel made telephone contact with Mr. Wakeel on September 8, 1976. Based upon the telephone conversation, and on the same day of the conversation, Mr. Boitel drafted a proposed affidavit and sent it to Wakeel. The covering letter and the proposed affidavit are, respectively, reproduced at A. 308, 309-315. The concluding portion of the covering letter made clear that Wakeel was free to change

* See Section E of this brief, supra, at pp. 9-10.

the affidavit in any manner he saw fit to accurately reflect the events in question, and that it should reflect only the truth as he knew it (A. 308).

On September 16, 1976, a Utica attorney contacted Mr. Boitel by telephone, and advised him that the board of directors of the Ramada Inn had directed Mr. Wakeel not to execute any affidavit with respect to this matter, but that the board of directors would not oppose the taking of Mr. Wakeel's deposition if such deposition were to be ordered by a Court and if the United States Attorney's Office were given the opportunity to attend and also examine Mr. Wakeel (54, 56). On that same day, Mr. Boitel wrote to the Utica attorney, with a copy to Mr. Wakeel, confirming the telephone conversation, and requesting that the board of directors of the Ramada Inn reconsider its position, or at least consent to a deposition, on notice to the United States Attorney's Office, in the absence of a court order. (A. 316-317). No response was received (36-37, 87; A. 317).

All of the aforesaid information, including the proposed affidavit, was filed in support of the instant petition, together with an application to depose Mr. Wakeel, on notice, in aid of the petition. Also filed was a sworn affidavit of Mr. Boitel, which stated that the proposed affidavit contained the substance of the information which Mr. Wakeel had communicated to him during the telephone conversation (85).

We urge the Court to read the entire proposed

affidavit (A. 309-315). The particularly significant facts are as follows:

(a) Wakeel was on duty in the lounge and lobby area at the time of the incident, and became aware of the incident as it was occurring (A. 309-310);

(b) the jurors and several marshalls were lodged on the second and third floors of the building, and the lodging records are still available (A. 310);

(c) he does not recall seeing any jurors in the vicinity of the incident or on the first floor at the time of the incident (A. 310);

(d) from the rooms of some of the jurors, it may have been possible to view the police cars on the scene, but not the place where King was lying on the ground (A. 310-11);

(e) there was a telephone in the room of each juror which provided direct dialing out of the Hotel, without any intervening monitoring device. The automatic meter records of such calls are still available. (A. 311);

(f) incoming calls were received at a switchboard, and the telephone operator had been requested to direct such calls to the United States Marshalls (A. 311);

(g) the jurors took their meals in the same common dining room that was used by the other guests of the Motel and by the public, and they entered the dining room through the same doors used by the general public, and would walk through the general dining area to their tables, which were not visually oraurally segregated from those of the general public. (A. 312);

(h) when it was anticipated that the jurors would be coming through the Motel lobby, newspapers on sale were removed to a place behind the lobby desk, but may have been observable if a juror had reason to make

inquiry at the desk. (A. 313);

(i) each of the jurors' rooms had an operating television set, which remained in the rooms on the Saturday night of the incident and through the following Sunday. During the following week, at a time when the jurors were not in the Motel, the marshalls instructed that the television sets be removed from the jurors' rooms. While the removal was in process, the marshalls rescinded the instruction, and directed that the television sets should be left in the jurors' rooms. As the television sets which had been removed, were being returned, the jurors arrived back at the Motel. The television sets remained in the jurors' rooms throughout the remainder of their stay. (A. 313-314);

(j) no device existed which prevented the free use of the television sets in the rooms, or which enabled someone outside of the room to monitor whether the television set was on or off or to know what, if any, broadcast was being viewed and heard on the television set. (A. 315).

Argument

POINT I

PURSUANT TO 28 U.S.C. §§ 144 & 455, JUDGE MacMAHON SHOULD HAVE DISQUALIFIED HIMSELF FROM FURTHER PARTICIPATION, AS A JUDICIAL OFFICER, IN THESE PROCEEDINGS, AND THE PETITION SHOULD HAVE BEEN ASSIGNED TO A DIFFERENT
DISTRICT JUDGE.

One of the items of relief sought by the petition (21), was the recusal or disqualification of Judge MacMahon from sitting as a judicial officer with respect to any of the relief requested by the petition. The request was supported by a legal and factual analysis (76-81), by

King's affidavit of disqualification (94-97), and by counsel's certificate (98). The government opposed disqualification of Judge MacMahon (107-110), and King filed a reply memorandum on the issue (158-161).

Judge MacMahon denied the application, contending that it did not satisfy the requirement of 28 U.S.C. § 144, since it failed to demonstrate "a personal bias or prejudice stemming from an extrajudicial source." (171). He additionally denied the application, pursuant to 28 U.S.C. § 455, to the extent that it was predicated upon the contention that the Court was a material witness as to the factual issues raised by the petition:

"First, we conclude that no hearing is required in order to evaluate King's legal claims, and, secondly, King's petition on its face reveals that the Court has no personal knowledge of and factual matters in dispute and cannot, therefore, serve as a material witness." (174).

Thus, relying upon the "duty to sit" rationale, Judge MacMahon refused to remove himself. (175).

We respectfully submit that Judge MacMahon was in error in all respects.

28 U.S.C. § 144 provides:

"Bias or prejudice of judge.

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall

be assigned to hear such proceedings.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exist, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Whenever a motion is made under § 144, the Court may pass upon the sufficiency of the affidavit, but may not pass upon the truth of the matters alleged. Berger v. United States, 255 U.S. 22 (1922); Action Realty Co. v. Will, 427 F. 2d 843, 844 (7th Cir., 1970); United States v. Roca-Alvarez, 451 F. 2d 843, 847-848 (5th Cir., 1971); Rosen v. Sugarman, 357 F. 2d 794, 797 (2d Cir., 1966); Wolfson v. Palmieri, 396 F. 2d 121, 124 (2d Cir., 1968).

As was noted in Wolfson, supra:

"***Comments and rulings by a judge during a trial of a case may be relevant to the question of the existence of prejudice. Conceivably, also, and we shall assume this in petitioner's favor, as was done in Rosen v. Sugarman, supra, contacts during a trial might themselves have created such a degree of irritation with a party or his lawyer as to create the bent of mind to which the Supreme Court referred in Berger." (396 F. 2d 124-125).

As indicated in Berger v. United States, supra, the Supreme Court of the United States held that to be sufficient an affidavit must show "the objectionable inclination or disposition of the judge", and it must give "fair

support to the charge of a bent of mind that may prevent or impead impartiality of judgment" (255 U.S. at 33-35).

In United States v. Womack, 454 F. 2d 1337 (5th Cir., 1972), it was held that a trial judge should have disqualified himself, citing certain comments which the judge had made concerning Womack in the course of proceedings against other defendants:

"We now turn to the sufficiency of the affidavits. The law on this question is extensive but we need not belabor its breadth or nuances to decide this case, in which the allegations of the affidavits are clearly sufficient. During the Musgrave trial, the judge referred to appellant as a man 'who everybody admits was certainly a shadey character', and told the jury: 'If you find that Musgrave did this there is no question but that Womack was working with him hand and glove...he would be as culpable.'" (454 F. 2d at 1341).

In Action Realty Co. v. Will, supra, 427 F. 2d at 845, the following was noted:

"We would add to the foregoing salutary pronouncement that no doubt some judges, even though not biased or prejudiced, have denied motions for a new judge simply because of a feeling that to grant the motion could be construed to be an admission of the non-existent ground for disqualification.

"This motivation, we feel, should never deter a judge from granting the motion if the over-all administration of justice, and the needs of the particular litigation are improved thereby. This is the same basic policy which precludes the entering of a compromise in settlement as being considered an admission of liability." (427 F. 2d at 845).

In the present case, King's affidavit of

disqualification alleged that Judge MacMahon had personal bias or prejudice against him or in favor of the government, as indicated by the following:

(1) Judge MacMahon's persistent refusal to poll or question the jurors, and the likelihood that he would not be able to objectively assess the allegations of the petition or the evidence which would be produced at a hearing, since they would all reflect upon his own considered omission;

(2) at the time of sentence, Judge MacMahon characterized King as, "a cold-blooded, cruel, vicious and violent man as to society." (A. 140c);

(3) the sentence which Judge MacMahon imposed upon King far exceeded the sentences imposed upon the co-defendants, despite the fact that even if the government's evidence were believed, King's conduct was far less egregious than that of certain of the other defendants;

(4) despite repeated requests that King's name be removed from a prior petition, since it had been filed without his knowledge or consent, no action was taken by Judge MacMahon to do so, either before or after the rendition of his determination as to that petition;

(5) Judge MacMahon's source of information concerning the exposure of jurors to extra-judicial information was, itself, based upon extra-judicial information, and that factual problem goes to the heart of the present application.

This issue is discussed further, infra, at pp. 31-4.

(6) subsequent to the trial, King's trial counsel improperly forwarded to Judge MacMahon a communication from King to his trial attorney, which cast aspersions upon the motivations and intent of Judge MacMahon. That letter (A. 280-281), presumably came to the attention of Judge MacMahon at the time it was filed, and necessarily came to his attention as part of the instant petition, since it established that the instant petition was not a "successive" petition. In this privileged communication from the defendant to his attorney, there was contained inter alia: (a) scepticism as to the Judge's word with respect to the Judge's off-the-record communication with an unidentified marshall; (b) the claim of "a deliberate attempt by the Judge to prevent discovery of a vital error", and the use of a "scare tactic" by the Judge; and (c) the claim that "the Judge had a vested interest in concealment of any incident that would abort the process against us." (A. 281).

Thus, through no fault of his own, King has had exposed to Judge MacMahon the contents of an attorney-client communication which was never intended for Judge MacMahon's eyes, and which could not but have prejudiced him against King.

28 U.S.C. § 455 provides, in pertinent part:

"Disqualification of justice, judge, magistrate or referee in bankruptcy.

"(a) any justice judge... of the United States shall disqualify himself in any

proceeding in which his impartiality
might reasonably be questioned.

"(b) he shall also disqualify himself in the following circumstances:

"(1) where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings.

* * *

"(5) he ... *** (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

* * *

"(d) for the purposes of this section the following words or phrases shall have the meaning indicated:

"(1) 'proceeding' includes pre-trial, trial, appellate review or other stages of litigation.

* * *

"(e) no justice, judge ... shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

It is clear that Judge MacMahon is a witness in this case. He obtained information, ex parte, from an unidentified United States Marshall, and utilized that information for the purpose of making his determination not to examine the jury at the time of the trial. Indeed, in denying the instant petition, Judge MacMahon states:

"The marshall in charge of the

jury had been instructed from the outset of the trial to insulate the jury from all media publicity about the case and had assured us that our instructions in that regard had been followed. The marshall also assured us that the jury, sequestered on the opposite side of the Motel from the parking lot where the shooting occurred, had not become personally aware of the fracas and had not seen or heard any publicity concerning it.***" (167-168). [Emphasis added].

* * *

"As in Manson, [61 Cal. App. 3d 102, 132 Cal. Rep. 265 (2d Civ., 1976)], we were satisfied during King's trial, on the marshall's assurances, that our sequestration order had not been violated." [Bracketed material and emphasis added]. (167).

If King were granted an evidentiary hearing, Judge MacMahon would certainly be called as a witness for the purpose of ascertaining the identity of the heretofore unidentified marshall in question, and for the purpose of ascertaining the substance of the information given to Judge MacMahon by the marshall.

It should be noted that, in United States v. Wolfson, - F. 2d - , 76 S1 4021 (2d Cir., June 3, 1977), this Court recently rejected Judge MacMahon's "duty to sit" rationale:

***We recognize that § 455(a) is designed to negate the 'duty to sit' notion and to allow 'a greater flexibility in determining whether disqualification is warranted in particular situations.' United States v. Ritter, 540 F. 2d 459, 462 (10th Cir., 1976), cert den., 97 S.Ct. 370 (1976)." (76 S1 at 4028-4029)

See also: H.R. REP. No. 93-1453, 93rd Cong.,

2nd Sess. 5.

In United States v. Wolfson, supra, this Court specifically noted the applicability of 28 U.S.C. §§ 144 & 455 to proceedings brought under 28 U.S.C. § 2255 (76 S1. at 4030-1).

Significantly, even in the absence of proof of personal bias, this Court has found it appropriate to order recusation:

"Absent proof of personal bias requiring recusation, Title 28 U.S.C. § 144, the principal factors considered by us in determining whether further proceedings should be conducted before a different judge are (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether re-assignment is advisable to preserve the appearance of justice, and (3) whether re-assignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." United States v. Robin, - F. 2d - , 76 S1. 2591 (2d Cir., March 30, 1977) (en banc).

See also: United States v. Stein, 544 F. 2d 96 (2d Cir., 1976).

It is respectfully submitted that, in the present case, separate and apart from the proof of personal bias and the fact that Judge MacMahon would likely be a witness in the proceeding, it can reasonably be expected that Judge MacMahon would have substantial difficulty in putting out of his mind his previously expressed views and findings, and that his recusation would be advisable to preserve the

appearance of justice. Moreover, the assignment of a different judge would not entail any significant "waste or duplication", since only a small part of the existing trial record is concerned with the facts relevant to the petition.

Judge MacMahon's reliance United States v. Bernstein, 533 F. 2d 775, 785 (2d C 76), is misplaced. (173). Bernstein involved a recusal application which predated the enactment of § 455, and the opinion explicitly was not decided under the standards imposed by § 455 (533 F. 2d at 785.

Although § 455 is controlling in this case, even the cases decided prior to its enactment support King's recusal application. Thus, in Bernstein, supra, the Court stated that "The rule of law... is that what a judge learns in his judicial capacity...is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." (533 F. 2d at 785). A judge acquires information 'in his judicial capacity' either from the files and records of the case or by way of proceedings of record. In the present case, Judge MacMahon's conversation with an unidentified marshall, as well as any other information acquired by Judge MacMahon, ex parte, does not fall within either of the aforementioned categories. The fact that Judge MacMahon later repeated, for the record, a summary of his extra-judicially acquired information, does not change its extra-judicial nature.

For all of the above reasons, the order of the

Court below should be vacated, and the petition, in its entirety, should be directed to a different district judge for disposition.

POINT II

THE ISSUES RAISED BY THE PETITION
HAVE NOT BEEN PREVIOUSLY ADJUDICATED
ON DIRECT APPEAL.

King's brief, filed in connection with his direct appeal, sets forth the arguments raised on that appeal (A. 163, et seq.). The brief argued that a mistrial should have been granted due to "possible prejudice" resulting from the shooting incident, that the trial court should have questioned the jurors as to whether they had been exposed to any prejudicial publicity, and that the mere fact of King's inability to attend the trial required the declaration of a mistrial as to him.

As can be seen, there was no evidence in the record to the effect that the jury had actually been exposed to such publicity, or to the effect that the extent of the injuries inflicted upon King was the result of the excessive use of force.

While, in his most recent order, Judge MacMahon makes reference to the appeal and to the intervening § 2255 application, he nevertheless stated that he would deal with the matter on its merits (175-176).

In this connection, it is noteworthy that King,

himself, was incapacitated in a hospital at the time the "record" was being made, and that he has been continuously incarcerated since that time. This petition brings before the Court for the first time those facts which (a) demonstrate the substantial potential which existed for the exposure of the jury to prejudicial publicity; (b) the executed statement of a juror showing that she actually read newspapers and saw television programs concerning the case during the period of her sequestration, and was aware on February 27, 1973 of the reason for King being in the hospital; (c) the excessive use of force upon King by law enforcement authorities.

For all of the above reasons, including the fact that Judge MacMahon proceeded to review the merits of the petition, no bar to review is presented by the prior appellate proceedings herein.

POINT III

IF THE JURORS WERE, IN FACT, EXPOSED
TO PUBLICITY CONCERNING THE SHOOTING
INCIDENT IN WHICH KING WAS INVOLVED,
THEN KING WAS DEPRIVED OF A FAIR TRIAL
AND HE IS ENTITLED TO VACATION OF THE
SENTENCE AND JUDGMENT.

Although Judge MacMahon refused to question the jurors concerning whether they had been exposed to information concerning the shooting incident, his stated reason for not doing so was that he believed the jurors had not been so exposed, in fact. His basis for that belief appears to

have been an ex parte conversation with an unidentified United States Marshall who was one of those charged with insulating the jurors from such exposure.

This petition placed before the Court a signed statement of a trial juror, acknowledging that, during the trial, she had been exposed to newspaper and television reports concerning King.

Aside from the aforementioned direct evidence of knowledge on the part of at least one juror, the petition also placed before the Court a circumstantially reliable assessment of what the manager of the Ramada Inn would state, if called as a witness, with respect to the communications environment in which the jurors existed while sequestered. (Supra, pp. 17-20.)

Judge MacMahon's statements, following the incident and through to the end of the trial, contain the implicit assumption that if the jurors had been exposed to such information, it would have been prejudicial to King.

The information contained in the petition certainly overcomes any ex parte, unrecorded assertions that an unidentified marshall made to the trial judge. That evidence should, at least, entitle King to a hearing at which the jurors can reveal what, if any, information they learned. Despite the passage of time, it is unlikely in the extreme that any of the jurors would not have a clear memory of whether he did or did not know of the shooting incident before the jury was discharged.

With respect to the statements made by an unidentified marshall to the trial judge, we note that the statements and conduct of those charged with protecting the trial jurors have been shown to be unreliable on several occasions. See: United States ex rel. Tobe v. Bensinger, 492 F. 2d 232 (7th Cir., 1974); Parker v. Gladden, 385 U.S. 363 (1966). See also: United States v. Guthrie, 387 F. 2d 569 (4th Cir., 1967), where it was held that an ex parte communication to the Court, denying that a juror had been exposed to prejudicial information, will not eliminate the necessity for a hearing, even though such ex parte communications are under oath and the contents thereof are disclosed to the defense in haec verba - circumstances not present here.

Exposure of jurors to extra-judicial information concerning a defendant is presumptively prejudicial and affirmative proof of harmlessness is required to overcome that presumption.

Writing for the Supreme Court, more than sixty years ago, Mr. Justice Holmes stated:

"***The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado, 204 U.S. 454, 462 (1907).

In Remmer v. United States, 347 U.S. 227, 229 (1953), the Court held:

"In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror

during a trial about the matter pending before the jury is for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court during the trial, with the full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish after notice to and hearing of the defendant, that such conduct with the jurors was harmless to the defendant." [Emphasis added].

The same principle was recently reasserted by this Court in United States v. Brasco, 516 F. 2d 816, 819 (2d Cir., 1975); see also: United States v. Thomas, 463 F. 2d 1061 (7th Cir., 1972); United States v. Taylor, 550 F. 2d 98, 76 S1 2805, 2826-28 (2d Cir., 1977); United States v. White, 553 F. 2d 310, 76 S1 3049, 3056-7 (2d Cir., 1977); United States v. Mase, 556 F. 2d 671, 76 S1 4037, 4042-5 (2d Cir., 1977).

The mere fact, "that the jury was instructed on numerous occasions to consider only evidence presented in open court.", will not defeat a motion to set aside a verdict, based upon exposure of a juror to prejudicial extra-judicial information. Gafford v. Warden, 434 F. 2d 318 (10th Cir., 1970).

POINT IV

AN EVIDENTIARY HEARING IS REQUIRED
WHERE FACTS ARE SHOWN WHICH INDICATE
THAT ONE OR MORE JURORS MAY HAVE
BEEN EXPOSED TO PREJUDICIAL PUBLICITY.

United States v. Valenciano, 495 F. 2d 585 (3d Cir., 1974), states the applicable rule with respect to the requirement of a hearing in a proceeding brought under 28 U.S.C. § 2255:

"Facially, this record colloquy [concerning whether a defendant had entered a plea of guilty without threats, inducements or promises] would seem to be conclusive, but the brute fact is that Congress has mandated an evidentiary hearing in a § 2255 proceeding '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief....' 28 U.S.C. § 2255. The possibility exists that an inherent part of the out of court understanding was that appellant would respond negatively to an open court inquiry as to whether promises had been made. In any event, the allegations are directed to evidentiary matters not in 'the files and records of the case.'" (495 F. 2d at 587).

Similarly, in Marchibroda v. United States, 368 U.S. 491 (1962), the Court set out in unequivocal terms the circumstances under which a petitioner is entitled to an evidentiary hearing:

"***This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light.

Nor were the circumstances alleged of a kind that the district judge could completely resolve by drawing upon his own personal knowledge or recollection." (368 U.S. at 494-5) [Emphasis added].

In the present case, the only evidence in the record concerning the exposure of the jury to publicity of the shooting incident, is the fact that the jury was sequestered, and the trial court's conclusory statement concerning hearsay allegations by an unidentified United States Marshall, to the effect that none of the jurors had suffered such exposure.

In contrast, the petition presented to the Court a juror's executed statement that she received extra-judicial communications, during the trial, by means of newspaper and television, concerning the petitioner, and that she was then aware of the reason for the petitioner's hospitalization.

The petition further showed, by virtue of the statements of Mr. Wakeel, the Motel manager, that the jurors had ready access to television sets and telephones, without possibility of monitoring. Additionally, his statements show that the jurors had regular contact with the public under circumstances which may have exposed them to such information. The dramatic events which occurred right outside the Motel cannot be ignored in considering the extent to which those events may have been discussed by persons who visited or worked in the Motel.

The facts presented by the petition, therefore,

fit squarely into the hearing requirements of 28 U.S.C.
§ 2255.

- A. The trial juror who has given a statement, as well as the other trial jurors, may properly testify with respect to any extra-judicial information which was conveyed to them concerning King, during the course of their sequestration.
-

Rule 606(b) clearly provides that, "upon an inquiry into the validity of a verdict or indictment ... a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror."

In testifying before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, House of Representatives, 93 Congress, 1st Session, on the proposed rules of evidence, Serial No. 2, at p. 250, Circuit Judge Friendly stated as follows in distinguishing the types of inquiries which may be addressed to jurors following a verdict:

***If for example, it has been found that some inflammatory newspaper article had gotten into the jury room, I think all of us would want to have that verdict upset."

The principle in question is a long-standing one and is really without doubt. Mattox v. United States, 146 U.S. 140, 149 (1892); Government of Virgin Islands v. Gereau, 523 F. 2d 140, 148-9 (3rd Cir., 1975); United States v. Wilson, 534 F. 2d 375 (D.C.Cir., 1976).

The fact that the exposure to newspaper publicity may have been outside the jury room, is irrelevant. In United States ex rel. Owen v. MacMahon, 435 F. 2d 813 (2d Cir., 1970), cert den., 402 U.S. 906 (1971), one of the jurors had apparently told other jurors about various misconduct in which the defendant had been involved. This Court held that juror testimony as to these facts was proper.

The jurors in the present case are clearly competent to testify as to whether they were the recipients of any information concerning King during the course of their sequestration.

Judge MacMahon's opinion (at 177) minimizes the significance of the statement executed by the juror. In fact, the statement appears to be clear enough, on its face. If there is any doubt as to the meaning of the statement or as to whether the juror actually executed it, the means are readily at hand for the Court to pull the curtain down on that aspect of the case by convening a preliminary hearing for that purpose.

Any present doubt should be resolved in favor of King in view of the Court's post-verdict directive to the jurors that they not speak to anyone about the case and that they call the FBI if they should be approached. As shown by the affidavit of counsel, in support of the petition (83-84), he respected the Court's directive and caused to be

interviewed only one of the persons who had witnessed the juror execute the statement.

With respect to the statement itself, it is clear that an effort was made not to influence the juror by a discussion of the facts. Such a course was obviously a prudent one.

Under all of the circumstances, Judge MacMahon was clearly in error in minimizing the significance of the juror's statement.

B. The unsworn statements of Mr. Wakeel properly provide a basis for an evidentiary hearing or, alternatively, for an order directing Mr. Wakeel to submit to a deposition.

It is our contention that the executed statement of the juror, alone, necessitates the grant of a hearing. Particularly in view of the juror's statement, the unsworn statements of Mr. Wakeel to King's attorney take on an overwhelming significance. In view of the trial court's direction, after the verdict, that none of the jurors converse with anyone concerning the case, King has been left with no means at his disposal which will permit him to uncover further facts. Wakeel, himself, is apparently willing to disclose what he knows, but has been prevented from doing so by direction of his employer.

(Supra, pp.

It is true that in denying a prior application (to which King was not properly a party) for \$ 2255 relief,

based upon unsworn statements of Mr. Wakeel, Judge MacMahon rejected those statements as being insufficient due to their hearsay nature (A. 299-300). He does likewise in his present order (178).

One cannot pause but to note that Judge MacMahon's basis for concluding, at the time of trial, that the jurors had not been exposed to prejudicial publicity was, itself, based upon the hearsay assertion of a United States Marshall. He persists in that stance in his present order (Supra, pp. 12-15). In contrast to such a conclusory, ex parte assertion, Mr. Wakeel's statements are detailed and specific, readily capable of being confirmed at a hearing, and cast extreme doubt upon the marshall's claim.

In People v. DeLucia, 20 N.Y. 2d 275, 278, 282 N.Y.S. 2d 526, 528 (1967), the New York Court of Appeals concisely stated the principle which should be applied to the predicament which confronts King:

"Where the Supreme Court holds that a particular series of events, when proven, violates a defendant's constitutional right, implicit in that determination is the right of the defendant to prove facts substantiating his claim."

See also: ABA Project on Minimum Standards for Criminal Justice, Trial by Jury, § 5.7(c)(i).

In United States v. Eagle, 539 F. 2d 1166 (8th Cir., 1976), one of the jurors admitted, following the trial, that the defendant was one of the men charged with the shooting of two FBI agents in an unrelated incident. On a motion for

a new trial, the defendant moved to subpoena the jurors, and the motion was denied. The information concerning the particular juror had been obtained by the defendant's attorney from another attorney who claimed to have spoken to the juror in question. A hearing was held on the motion, and the attorney testified as a witness.

In United States v. McKinney, 429 F. 2d 1019 (5th Cir., 1970), the defendant had escaped from the local jail while awaiting trial, and the escape received extensive coverage in the newspapers in the area. Following a subsequent apprehension, conviction and sentencing, his attorney brought a motion to set aside the verdict upon the ground that the jurors had discussed the jailbreak incident. The basis for the claim by the attorney was "that such discussion of the facts and the misconduct of the jurors had been confirmed to the defendant's Court-appointed attorney by the juror...". No affidavit or other evidence was submitted in support of the motion, and it was denied by the trial court.

On appeal, the Court, in McKinney, held:

"In the present case, we think it is clear that an evidentiary hearing should have been held to investigate the allegation in McKinney's motion for a new trial. Since the trial court did not hold such a hearing, but merely entered an order overruling the motion, a remand to the trial court would appear to be the proper disposition of this case." (429 F. 2d at 1026).

The Court in McKinney, in holding that it was an

abuse of discretion for the trial court not to hold a hearing, continued as follows:

"The government next attempts to defend the trial court's failure to hold a hearing on the ground that McKinney did not make an adequate factual showing at trial. His motion for a new trial was not accompanied by any supporting affidavits or other evidence, and it is the government's view that 'the motion on its face was inadequate to even raise a substantial question as to the issue of misconduct or the possibility of prejudice arising therefrom.' We cannot agree. McKinney's allegation mentioned jury discussion of a specific incident as allegedly related to McKinney's counsel by a specific juror, whose name and address were given. The factual import of the allegation is clear, and the inclusion of the allegation in the motion for a new trial, without supporting affidavits, was not procedurally inappropriate." (429 F. 2d at 1030). [Emphasis added].

As the above authorities show, there are circumstances where allegations, although based upon hearsay, will nevertheless require the grant of an evidentiary hearing. In view of the circumstances of the present case, it would be difficult to imagine a more appropriate case for the application of that requirement.

POINT V

THE LOWER COURT'S "VOLUNTARY ACT"
RATIONALE IS INAPPLICABLE TO THE
FACTS OF THIS CASE.

In his opinion, Judge MacMahon seeks to weave a waiver rationale, both with respect to any prejudicial publicity that King in fact suffered (182-189) and with

respect to the excessive use of force by law enforcement officers, which caused King not to be able to attend at his own trial (189; see also: Point VI, infra).

In substance, Judge MacMahon's position is as follows: during the course of the trial, the defendant committed a voluntary act and he cannot be heard to complain as to the prejudice which resulted to him from that act.

The authorities cited by the Court are inapposite, and the factual analysis is defective.

Each of the authorities cited by the Court (183-187, 190), involves a situation where a defendant became unruly in the courtroom and refused to desist or a situation where a defendant voluntarily remained away from the courtroom. None of the cases involve a situation where a voluntary act of the defendant rendered him unable to continue to attend at the trial or involved a degree of overreaction by law enforcement authorities which generated the sort of publicity or sort of injuries existent in the present case.

If King had voluntarily shot and killed himself, the prosecution, as against him, would have abated. If, instead of killing himself, he had committed an act which destroyed his cognitive powers, the trial, likewise, could not have continued. If, during the night in question, he had voluntarily driven a car and had become in an incapacitating accident, there is no authority for the proposition

that the trial would have properly continued in his absence.

We turn, then, to the facts of this case. Without the benefit of a truly adversary hearing, at which the defendant was present, Judge MacMahon has determined that King voluntarily threw a grenade through the window of the FBI agent's home.*

The opinion then goes on to assume that the results of the defendant's acts were proportional to those acts and that King had reason to anticipate those results. All of these conclusory assertions are without proper record support. Moreover, even if they were correct, no statutory or decisional authority exists to support the Court's conclusion that a defendant, once having acted voluntarily, is not thereafter entitled to a fair trial and is not entitled to attend at his own trial, even if such attendance requires the declaration of a mistrial

*The incident resulted in a separate indictment of the defendant (73 Cr. 94; docket sheet reproduced at pp. 10b-10c of the appendix filed with this Court). It appears that King pled guilty to a count charging possession of a hand grenade, but not to throwing it or otherwise using it in the fashion indicated by the publicity. Cf. Judge MacMahon's opinion, at 170).

as to him. Judge MacMahon did not appear to have taken that view at the time of trial.

A defendant is entitled to a fair and impartial jury. At the time of the shooting incident, the jury was sequestered and, if proper preventive measures had been taken, their exposure to prejudicial information via newspaper, television and telephone could have been foreclosed.

Additionally, if the defendant had not been subjected to a clearly planned ambush, the incident would not have taken on anywhere near the proportions involved. The nature of the planning that went into that ambush leaves little doubt that the law enforcement authorities could have arrested the defendant with little, if any, aggressive conduct occurring. They deliberately chose not to, and that was the immediate cause of the publicity.

POINT VI

THE EXCESSIVE USE OF DEADLY FORCE
BY THE LAW ENFORCEMENT OFFICERS WHO
APPREHENDED HIM, CAUSED KING TO BE
UNABLE TO ATTEND AT HIS TRIAL AND,
THEREFORE, HE WAS DEPRIVED OF HIS
SIXTH AMENDMENT RIGHT TO ATTEND AT
THE TRIAL.

King's affidavit, which is annexed to the petition (89-93), showed that, at a point when he had been rendered helpless, and was under the complete control of law enforcement authorities, several bullets were shot into his back at

point blank range, as he lay face down in the snow.

New York Penal Law § 35.30 sets forth the basis upon which a peace officer may utilize deadly physical force against a suspect, i.e.:

"...when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force..."

If King is correct in his perception of the manner in which a number of his injuries were sustained, there is no reasonable construction of CPL § 35.30, nor any other rational justification for the infliction of the injuries in the manner alleged.

King had a clear Constitutional right to attend at his trial. If police officers exceeded the rational scope of their authority and inflicted injuries upon King to a far greater extent than could reasonably have been deemed necessary, and if those injuries prevented King's attendance at the trial, then he was clearly deprived of his Sixth Amendment right.

The law enforcement officers involved obviously were lying in wait for King at Agent Kelly's home, and do not appear to have made any effort to intercept King before the situation escalated into one of violence. In short, their conduct constituted a supervening, intervening cause for his absence. Police officers have no right to

summarily execute individuals who they know are about to commit crimes.

For the above reasons, as requested in the petition, a hearing should have been convened for the purpose of determining the causal relation between any excessive force by the police and King's absence from the trial.

POINT VII

UNDER THE CIRCUMSTANCES OF THIS CASE,
IT WAS AN ABUSE OF DISCRETION FOR THE
TRIAL COURT NOT TO GRANT KING'S ALTER-
NATIVE REQUEST FOR AUTHORITY TO DEPOSE
_____ ANT WITNESSES.

In Harris v. Nelson, 394 U.S. 286, rehearing den., 394 U.S. 1025 (1969), the Supreme Court discussed remedies available to a petitioner who is seeking to collaterally attack his conviction:

"At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly 'dispose of the matter as law and justice require,' either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be 'necessary or appropriate in aid of [its jurisdiction]*** and agreeable to the usages and principles of law.' 28 U.S.C. § 1651.

"We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its

basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the 'usages and principles of law.'" (394 U.S. at 300).

To the same effect, see: Argo v. United States, 473 F. 2d 1315 (9th Cir., 1973); Wagner v. United States, 418 F. 2d 618, 621 (9th Cir., 1969).

If, the petition, as it presently stands, is factually deficient, then the reasons therefore are understandable and not ascribable to King. It was the trial court, that prohibited the jurors from discussing the matter with anyone. It is the police officers who exercised complete control over the ambush of the defendant. It was the trial court that failed to convene an inquiry into the matter in the presence of the defendant, at or about the time of the trial. It is the board of directors of the Ramada Inn which has prohibited its employee from executing any affidavit in this matter, despite his own, obvious, predisposition to do so.

In the event that this Court does not deem it appropriate to remand this case with directions that a hearing be convened, then it is respectfully urged that

the alternative relief requested in the petition be afforded to King (item 4, at p. 23; see also: item 2 at pp. 21-22).

Conclusion

For all of the above reasons, the order of Judge MacMahon should be vacated, with directions that the petition, in its entirety, be heard by a different district judge, and that a hearing be convened with respect to the allegations of the petition; or, in the alternative, that King be granted the right, by court order, to depose the relevant witnesses, upon notice to the government.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Petitioner-Appellant
Louis Charles King

October, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LOUIS CHARLES KING, :

Docket No. 77-2106

Petitioner-Appellant, :

CERTIFICATE OF SERVICE

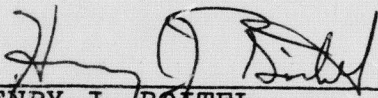
-vs.- :

UNITED STATES OF AMERICA, :

Respondent-Appellee. :

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HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York, and a member of the Bar of this Court, hereby certifies that on October 25, 1977 he served one (1) copy of the Appellant's Appendix herein and two (2) copies of the Brief in Behalf of Petitioner-Appellant, upon Paul V. French, United States Attorney for the Northern District of New York, Federal Building, 100 So. Clinton Street, Syracuse, New York 13202, by depositing same in a post-paid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service within the State of New York.



HENRY J. BOITEL

New York, New York
October 25, 1977

